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## United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*  
KRISTINE J. LUCIUS, *Democratic Chief Counsel and Staff Director*

January 29, 2016

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Chairman Tom Wheeler  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Dear Chairman Wheeler:

I write with questions regarding the Federal Communication Commission (FCC) and what some have described as its problematic and overreaching actions regarding consumer privacy regulation of broadband providers.

As you know, following the FCC's controversial *Title II Order* of February 2015, the FCC's Enforcement Bureau issued an enforcement advisory regarding consumer privacy on May 20th, 2015. In the advisory, the Enforcement Bureau purported to "provide[] guidance to broadband providers about how [it] intend[ed] to enforce Section 222" of the Communications Act, which requires telecommunications carriers to protect customer proprietary network information (CPNI). The Bureau specified that it "intends to focus on whether broadband providers are taking reasonable, good-faith steps, to comply with Section 222." It also contemplated "further guidance and/or adoption of regulations applying Section 222" to broadband.

As Chairman, you have indicated that the FCC was in the process of commencing a rulemaking to establish concrete rules with respect to consumer privacy. In June 2015 speech, you suggested that that the Commission "committed in the [*Title II Order*] to address issues of privacy implicated by consumers' use of the Internet" and that the FCC "will begin that process with a Notice of Proposed Rulemaking in the autumn." You also said in a November interview that the FCC would act on privacy within the "next several months." With the autumn behind us and the winter deadline approaching, I can only assume that the FCC is still contemplating a rulemaking with respect to broadband privacy.

It is not clear that the FCC has the authority to police consumer privacy in the manner contemplated. However, given this background, I would responses to the following questions:

1. The enforcement advisory states that “the Enforcement Bureau intends to focus on whether broadband providers are taking reasonable, good-faith steps, to comply with Section 222, rather than focusing on technical details.”
  - a. What specifically does the FCC consider to be “reasonable, good-faith steps”?
  - b. What specific legal standard does the FCC apply in determining whether a broadband provider’s activity to protect consumer privacy is “reasonable”?
  - c. What specific actions by a broadband provider would the FCC consider mere “technical details”?
  - d. How does the FCC define CPNI as used in Section 222? Is it coterminous with personal identifiable information (PII)? If not, how does CPNI under Section 222 differ from PII in the eyes of the FCC? What does the FCC believe is its legal authority with respect to the protection of PII?
2. How many investigations or inquiries regarding the privacy practices of broadband providers were commenced after release of the *Title II Order*?
  - a. How many remain open?
    - i. Please provide me with:
      1. A list of providers currently under investigation
      2. For each such provider, a description of the alleged conduct that led the agency to initiate an investigation
      3. A list of providers involved in investigations that were closed, and
      4. For each such provider, a description of the conduct under investigation and the resolution.
3. On November 5, 2015, the FCC entered into a settlement with Cox Communications, Inc., following a data breach suffered by Cox. This was widely regarded as the FCC’s first privacy and data-security enforcement action against a cable operator. As a condition of settlement, the FCC required Cox to pay a penalty of \$595,000 and to adopt a comprehensive compliance program, including system audits and breach notification systems.
  - a. Is it the FCC’s view that the PII of Cox’s broadband customers is currently covered by the *Title II Order* as interpreted by the May enforcement advisory?
  - b. Were the Cox investigation and settlement undertaken solely pursuant to the Enforcement Bureau’s asserted authority under the *Title II Order* as interpreted by the May enforcement advisory?
  - c. If not, what was the specific legal authority for the Cox investigation and settlement?
4. You have said repeatedly that the FCC plans to propose rules pursuant to Section 222 that would impose privacy-related requirements on broadband providers, as contemplated by the *Title II Order*.
  - a. Do you expect to circulate to your colleagues a notice of proposed rulemaking? If so, when?
  - b. Which bureaus and offices within the FCC are participating in the drafting process?
    - i. Are you also consulting or coordinating with executive agencies or other independent agencies within the Federal government? If so, which one(s)?

In addition to your prompt response, I request that you brief my staff on any proposed rules under consideration, including the status of and the legal authority for any rulemaking. I appreciate your attention to this matter, in strict accordance with all existing agency rules, regulations, and ethical guidelines.

Sincerely,

A handwritten signature in blue ink, appearing to read "J. Flake", is written over the word "Sincerely,".

Senator Jeff Flake  
Chairman  
Subcommittee Privacy, Technology and the Law

cc Mignon Clyburn, Commissioner  
Jessica Rosenworcel, Commissioner  
Ajit Pai, Commissioner  
Michael O'Reilly, Commissioner



March 4, 2016

Chairman Tom Wheeler  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Dear Chairman Wheeler:

I write to follow up on my letter to you from January 29, 2016. As you recall this letter regarded the FCC's proposed consumer-privacy regulation of broadband providers under the FCC's controversial *Title II Order*.

In my letter I requested answers to the following questions:

1. The [FCC's May 20, 2015] enforcement advisory states that "the Enforcement Bureau intends to focus on whether broadband providers are taking reasonable, good-faith steps, to comply with Section 222, rather than focusing on technical details."
  - a. What specifically does the FCC consider to be "reasonable, good-faith steps"?
  - b. What specific legal standard does the FCC apply in determining whether a broadband provider's activity to protect consumer privacy is "reasonable"?
  - c. What specific actions by a broadband provider would the FCC consider mere "technical details"?
  - d. How does the FCC define CPNI as used in Section 222? Is it coterminous with personal identifiable information (PII)? If not, how does CPNI under Section 222 differ from PII in the eyes of the FCC? What does the FCC believe is its legal authority with respect to the protection of PII?
2. How many investigations or inquiries regarding the privacy practices of broadband providers were commenced after release of the *Title II Order*?
  - a. How many remain open?
    - i. Please provide me with:
      1. A list of providers currently under investigation
      2. For each such provider, a description of the alleged conduct that led the agency to initiate an investigation
      3. A list of providers involved in investigations that were closed, and
      4. For each such provider, a description of the conduct under investigation and the resolution

3. On November 5, 2015, the FCC entered into a settlement with Cox Communications, Inc., following a data breach suffered by Cox. This was widely regarded as the FCC's first privacy and data-security enforcement action against a cable operator. As a condition of settlement, the FCC required Cox to pay a penalty of \$595,000 and to adopt a comprehensive compliance program, including system audits and breach notification systems.
  - a. Is it the FCC's view that the PII of Cox's broadband customers is currently covered by the *Title II Order* as interpreted by the May enforcement advisory?
  - b. Were the Cox investigation and settlement undertaken solely pursuant to the Enforcement Bureau's asserted authority under the *Title II Order* as interpreted by the May enforcement advisory?
  - c. If not, what was the specific legal authority for the Cox investigation and settlement?
4. You have said repeatedly that the FCC plans to propose rules pursuant to Section 222 that would impose privacy-related requirements on broadband providers, as contemplated by the *Title II Order*.
  - a. Do you expect to circulate to your colleagues a notice of proposed rulemaking? If so, when?
  - b. Which bureaus and offices within the FCC are participating in the drafting process?
    - i. Are you also consulting or coordinating with executive agencies or other independent agencies within the Federal government? If so, which one(s)?

I also requested that you brief my staff on any and all proposed rules under consideration, including the status of and the legal authority for any rulemaking.

While my letter asked for a "prompt response," it did not include a deadline for either your answers or the staff briefing. More than a month has passed without any response from you or the FCC. You have, however, told the Senate Commerce Committee this week that you expect to act on the proposed rulemaking "very soon, and that includes this month."

I am therefore requesting that you provide answers to my questions by March 18, 2016. Given your stated intention to move forward on the rulemaking this month, I would now request that you meet with me in person to explain your proposal. If you are unable to comply with these requests, please provide me a specific explanation as to why you cannot by March 18, 2016.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jeff Flake", is written over the typed name.

Senator Jeff Flake  
Chairman  
Subcommittee on Privacy, Technology and the Law





FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON

OFFICE OF  
THE CHAIRMAN

March 18, 2016

The Honorable Jeff Flake  
United States Senate  
413 Russell Senate Office Building  
Washington, D.C. 20510

Dear Senator Flake:

Thank you for your letters of January 29 and March 4, 2016 regarding the Commission's activities to protect consumer privacy in telecommunications sectors. As you know, Congress has tasked the FCC with implementing the requirements of Section 222 of the Communications Act as well as the other consumer privacy protections contained in the Act, including Sections 338 and 631 which apply to cable and satellite operators.

Section 222 establishes a duty on common carriers to protect the confidentiality of customers' proprietary information. It also protects the confidentiality of customer proprietary network information, also known as CPNI. Nearly two decades ago, the FCC adopted implementing regulations that require carriers to appropriately safeguard this information, and notify consumers and law enforcement of a breach. It also limits carriers' ability to use such information, absent customer consent. Over time, the Commission has modified those rules to adjust to changes in industry practices.

In February of 2015, as part of the Open Internet Order the FCC reclassified Broadband Internet Access Service (BIAS) as a telecommunications service. As a result, BIAS providers are subject to Title II of the Act, including the provisions of Section 222. The Commission found in the Open Internet Order that application of the statutory provisions of 222 to BIAS providers was necessary to protect consumers and further the public interest. However, the Commission was not persuaded that the existing rules implementing Section 222 for voice services would be well suited to BIAS providers.

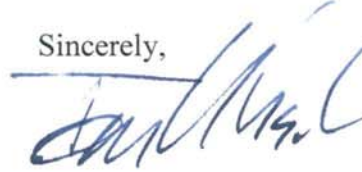
As referenced in your letter, the Enforcement Bureau released an Enforcement Advisory last year to provide guidance to broadband providers about how the Enforcement Bureau intends to enforce Section 222 in connection with BIAS during the time between the effective date of the Open Internet Order and any subsequent Commission action providing further guidance and/or adoption of regulations applying Section 222 more specifically to BIAS. This advisory guidance was intended to assist BIAS providers in their compliance with Section 222.

As you may know, on March 7, 2016, the Enforcement Bureau entered into a consent decree with Verizon Wireless resolving a Section 222 and 2010 Open Internet Transparency Rule investigation concerning the company's insertion of unique identifier headers, also called "supercookies," into its customers' Internet web traffic. In addition, last week I circulated to the full Commission a Notice of Proposed Rulemaking (NPRM) to ensure consumers have the tools they need to make informed choices about how and whether their data is used and shared by their

broadband providers. The proposal will be voted on at the March 31 Open Meeting, and, if adopted, would be followed by a period of public comment.

Answers to your specific questions are attached. Please let me know if I can be of further assistance.

Sincerely,

A handwritten signature in blue ink, appearing to read "Tom Wheeler", written over a horizontal line.

Tom Wheeler

Responses to questions:

1. **The enforcement advisory states that the “Enforcement Bureau intends to focus on whether broadband providers are taking reasonable, good faith steps to comply with Section 222, rather than focusing on technical details.”**

- a. **What specifically does the FCC consider to be “reasonable, good faith steps”?**

**Response:** The Enforcement Advisory provides that broadband providers must make reasonable, good faith efforts to comply with Section 222. It further provides that “By examining whether a broadband provider’s acts or practices are reasonable and whether such a provider is acting in good faith to comply with Section 222, the Enforcement Bureau intends that broadband providers should employ effective privacy protections in line with their privacy policies and core tenets of basic privacy protections.”<sup>1</sup> These privacy protections include the use of appropriate security and privacy safeguards to protect the confidentiality of customer proprietary information and an expectation that broadband providers act in accordance with the representations and commitments that they have made to their own customers. A “reasonable, good faith efforts” standard means that the broadband provider should make a well-intentioned effort to comply with the statutory provisions of Section 222. In this regard, the Enforcement Bureau expects that they should also comply with their own privacy policies and other representations that they may have made about their privacy practices. Providers should also employ reasonable security measures to protect the confidentiality of the proprietary information about their customers. Finally, when they fail to meet this duty, they should take appropriate remedial corrective action.

- b. **What specific legal standard does the FCC apply in determining whether a broadband provider’s activity to protect consumer privacy is “reasonable”?**

**Response:** A broadband provider is expected to take reasonable and good faith steps to protect the personal information of its customers. Whether a broadband provider’s activity to protect consumer privacy is “reasonable” in a given situation will depend on the particular facts and circumstances involved, including whether the provider has policies or procedures in place to protect personal information, the provider’s adherence to its posted privacy policy and other privacy representations, the nature and sensitivity of the personal information at issue, the risk of harm arising from the practice.

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<sup>1</sup> FCC Enforcement Advisory; Open Internet Privacy Standard; Enforcement Bureau Guidance: Broadband Providers Should Take Reasonable, Good Faith Steps to Protect Consumer Privacy, Public Notice, 30 FCC Rcd 4849, 4850 (EB 2015)



- c. **What specific actions by a broadband provider would the FCC consider mere “technical details”**

**Response:** The focus of the Enforcement Bureau’s examination is on the reasonableness of the privacy practices deployed by broadband providers, rather than technical details such as the particular software or equipment used by the provider. The Advisory does not prescribe specific technical requirements that broadband providers have to meet. Instead, it focuses on evaluating the overall compliance efforts and adherence to the commitments made by the broadband provider to its customers.

- d. **How does the FCC define CPNI as used in Section 222? Is it coterminous with personal identifiable information (PII)? If not, how does CPNI under Section 222 differ from PII in the eyes of the FCC? What does the FCC believe is its legal authority with respect to the protection of PII?**

**Response:** CPNI is defined in 47 U.S.C. § 222(h). Section 222(a) also imposes a duty on telecommunications carriers “to protect the confidentiality of proprietary information of, and relating to, [their] customers.”<sup>2</sup> Section 222’s duty to protect customer proprietary information includes the protection of CPNI. The Commission has found that the duty to protect proprietary information includes the protection of customers’ PII.<sup>3</sup> The scope of information covered by Section 222 in the BIAS context is among the issues raised in the recently circulated NPRM.

2. **How many investigations or inquiries regarding the privacy practices of broadband providers were commenced after release of the Title II Order?**

- a. **How many remain open?**

- i. **Please provide me with:**

1. **A list of providers currently under investigation**
2. **For each such provider, a description of the alleged conduct that led the agency to initiate an investigation**
3. **For each such provider, a description of the conduct under investigation and the resolution.**

**Response:** The Commission’s enforcement investigations are confidential to ensure the fair and impartial execution of the law. Responding to this request would involve disclosing sensitive information about Commission enforcement activities that have not been publicly disclosed through a Notice of Apparent Liability for Forfeiture (NAL) or other announcement. The untimely disclosure of such nonpublic law enforcement

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<sup>2</sup>See TerraCom, Inc. and YourTel America, Inc. Apparent Liability for Forfeiture, File No.: EB-TCD-13-00009175, Notice of Apparent Liability, 29 FCC Rcd 13325, paras. 13-30 (2014).

<sup>3</sup> See *id.* at 13335-40, paras. 31-41 (2014), *settled by TerraCom, Inc. and YourTel America, Inc.*, Order and Consent Decree, 30 FCC Rcd 7075 (Enf. Bur. 2015).

information could cause serious harm to the FCC's enforcement efforts and to outside parties. It could unfairly prejudice and financially damage a target who may not ultimately be found culpable; it could disclose the identity of whistleblowers or other confidential sources; it could invade individuals' privacy; it could reveal the Commission's sensitive law enforcement methods (thereby providing a "road map" of our investigative process); and it could deprive a person of a right to an impartial adjudication. Federal law recognizes the special sensitivity of records and information compiled for law enforcement purposes by exempting their public disclosure under both the Freedom of Information Act (FOIA)<sup>4</sup> and the Government in the Sunshine Act.<sup>5</sup>

Given the sensitive, confidential nature of this information, we are not providing it in this response. We would be happy to discuss further how we can provide you more information about our investigative activities while protecting our sensitive law enforcement information.

- 3. On November 5, 2015, the FCC entered into a settlement with Cox Communications, Inc., following a data breach suffered by Cox. This was widely regarded at the first data-security enforcement action taken by a cable operator. As a condition of settlement, the FCC required Cox to pay a penalty of \$595,000 and to adopt a comprehensive compliance program, including system audits and breach notification systems.**

- a. Is it the FCC's view that the PII of Cox's broadband customers is currently covered by the Title II Order as interpreted by the May enforcement advisory?**

**Response:** The Cox consent decree does not involve Cox's provision of broadband internet access service. However, in addition to being a telephone and cable provider, Cox provides broadband internet access service. Like all common carriers providing broadband internet access services, Cox is subject to the 2015 Open Internet Order, which applies the statutory provisions of Section 222 to BIAS providers. On November 5, 2015, the FCC entered into a consent decree with Cox Communications, Inc., following multiple data breaches at the company. As the consent decree provides in pertinent part, "Congress and the Commission have made clear that cable operators such as Cox must take such actions as are necessary to prevent unauthorized access to such information by a person other than the subscriber or cable operator. Furthermore, when acting as a telecommunications carriers, providers such as Cox must take every reasonable precaution to protect customers' data."<sup>6</sup>

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<sup>4</sup> 5 U.S.C. § 552(b)(7).

<sup>5</sup> 5 U.S.C. § 552b(c)(7).

<sup>6</sup> Cox Commc'ns, Inc., Order and Consent Decree, 30 FCC Rcd 12302 (EB 2015)



- b. Were the Cox investigation and settlement undertaken solely pursuant to the Enforcement Bureau's asserted authority under the Title II order as interpreted by the May enforcement advisory?**

**Response:** No. The Cox investigation was initiated several months prior to the adoption of the 2015 Open Internet Order based on events and reports from July to September 2014. The investigation concerned the unauthorized access to and release of PII and CPNI of Cox cable and telephone customers and therefore implicated long-standing protections applicable to cable and telephone customers. Cox's electronic data systems were breached in July and August 2014 when third parties used a common social engineering ploy known as pretexting. Specifically, the third parties pretended to be from Cox's information technology department and gained access to data systems containing Cox's customer information by convincing a Cox customer service representative and a Cox contractor to enter their respective account IDs and passwords into a fake website, which the third parties controlled. With this information, the third parties had unauthorized access to the PII of Cox's six million customers. Cox's relevant data systems did not have well accepted technical safeguards, such as multi-factor authentication, to prevent the compromised credentials from being used to access the PI and CPNI of Cox's customers. At least one of the third parties then posted some of the personal information of at least eight of the affected customers on social media sites, changed the passwords of at least 28 of the affected customers, and shared customer personal information with yet another unauthorized third party. Cox also failed to report these breaches through the Commission's breach-reporting portal, as is required by Commission rules.

- c. If not, what was the specific legal authority for the Cox investigation and settlement?**

**Response:** The Consent Decree with Cox resolved the Enforcement Bureau's investigation into whether Cox violated Sections 201(b) and 222(a) and (c), and 631 of the Communications Act of 1934, as amended, and Sections 64.2010(a) and 64.2011(b) of the Commission's rules.